

May 10, 2007

Maggie Clausell, Esquire
9 East Loockerman Street, Suite 205
Dover, DE 19901

Re: **Freedom of Information Act Complaint
Against City of Dover**

Dear Ms. Clausell:

On April 23, 2007, our Office received your complaint alleging that the City of Dover ("the City") violated the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by not providing you with the name of the person who lodged a complaint against Mr. Gary Lawson, a City employee, for allegedly misappropriating City property.

By letter dated April 23, 2007, our Office asked the City to respond to your complaint in writing by May 4, 2007. Our Office received the City's response on April 26, 2007.

According to the City:

Councilman Hogan received a verbal complaint that a City employee was using City owned property for his own personal use. Councilman Hogan verbally contacted the City Manager, giving the City Manager the name of the employee but not the name of the informant, all of this being verbal. The City Manager then verbally asked the employee's superior to look into the matter, which was done and it was found that no use of City owned property had been made by

the employee.

The City contends there are "no 'public records'" as defined by FOIA which "could be produced to give [you] the information" you seek. Alternatively, the City contends that the name of the informant is exempt from disclosure under FOIA as part of an investigatory file, citing 29 *Del. C.* §10002(g)(3): "It would certainly be a chilling effect on members of the public to know that their name might be disclosed when they are trying to point out what they consider to be a violation of the law."

RELEVANT STATUTES

FOIA provides that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body. 29 *Del. C.* §10003(a).

FOIA exempts from disclosure "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes, . . ." *Id.* §10002(g)(3).

LEGAL ANALYSIS

Your FOIA complaint is based on your letter dated August 11, 2006 to Councilman Kenneth Hogan asking for "the name of the individual" who alleged that Mr. Lawson was misappropriating City property. "Like the public records laws in other states, Delaware's FOIA 'does not compel the agency to provide answers posed by the inquirer.'" *Att'y Gen. Op.* 00-IB08 (May 24, 2000) (quoting *Kenyon v. Garrels*, 540 N.E.2d 595, 597 (Ill. App. 1989)). "The law only requires that public records be made available for inspection and copying." *Att'y Gen. Op.* 00-IB08.

FOIA did not require the City to answer your question about the name of the complainant, orally or in writing. Only if that information was memorialized in a document pre-existing your request might it be subject to the public record requirements of FOIA.

FOIA, however, "does not require a public body to produce public records that do not exist." *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 96-IB28 (Aug. 8, 1996)). The City Solicitor has verified that the City does not have any documents responsive to your FOIA request. "It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Att'y Gen. Op.* 06-IB10 (May 4, 2006) (quoting *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 97-IB01 (Jan. 14, 1997)). "[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.'" *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 96-IB28)).

Our Office determines that the City did not violate the public record requirements of FOIA. The information you requested was not contained in any document in existence prior to your request which the City could produce for you to inspect and copy. ¹

CONCLUSION

For the foregoing reasons, our Office determines that the City did not violate FOIA. The name of the informant was not memorialized in any record pre-existing your request which the City

¹ Therefore, our Office does not need to address the City's alternative contention that the name of the informant is confidential; however, we note that the Chancery Court has held that FOIA's investigative file exemption may cover the names of informants. Otherwise, "there would be a chilling effect upon those who might bring pertinent information to the attention of the [public body]." *News-Journal Co. v. Billingsley*, No. 5774, 1980 WL 3043, at p.3 (Del. Ch., Nov. 20, 1980) (Hartnett, V.C.).

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could make available for inspection and copying.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
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